(25)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 877

WERT T. REED AND F. F. DOLLERT
Petitioners

v.

HOUSTON OIL COMPANY OF TEXAS, ET AL
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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To the Honorable Chief Justice of the United States and the Associated Justices of the Supreme Court of the United States:

Wert T. Reed and F. F. Dollert pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above case on the 8th day of January, 1943, (Tr. R. 1041), affirming the judg-

ment of the District Court for the Southern District of Texas, Houston Division, (Tr. R. 504), and in this connection respectfully show:

The decision of the Circuit Court is as follows: (Omitting Preliminaries).

> "It is claimed by appellants that the contract and leases were secured by fraud, part of which consisted in bribing a corporate officer. Many issues were presented and many defenses raised in the court below, but appellees' real defense was that there was no fraud. No good could result either from restating the pleadings or reviewing the evidence in this case. The findings and conclusions of the district court are free from error, and the judgment appealed from is affirmed." (Tr. R. 1042). Reed v. Houston Oil Co. of Texas, et al., 132 F. (2) 748.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

This is a stockholders' action, brought by petitioners Wert T. Reed and F. F. Dollert, stockholders of the defendant, Pratt-Hewit Corporation (Delaware) referred to as "Pratt-Hewit Corporation," for themselves and all other stockholders similarly situated.

The purposes of this suit are—

FIRST—to cancel the written oil and gas contract entered into on September 28, 1925, between the Houston Oil Co. of Texas referred to herein

as the "Houston Oil Co.," and the Pratt-Hewit Corporation, on the grounds that

(a) Thomas H. Pratt, the Pratt-Hewit Corporation's dominant and controlling stockholder, secretary and treasurer, director and resident manager before and after said contract was made and who negotiated this contract on behalf of the Pratt-Hewit Corporation, was secretly having financial dealings personally with the Houston Oil Co. and therefore had disqualified himself from representing his corporation because of conflict of self interest with duty.

(b) By the September 28, 1925 contract, the directors of the Pratt-Hewit Corporation unlawfully attempted to delegate all the powers and discretion vested in them by the charter of the corporation and the laws of Texas and Delaware, to strangers, the officials and directors of the Houston Oil Co., a competitor.

(c) The contract violates the Usury Statute of Texas.

(d) The contract violates the Anti-trust laws of Texas.

SECOND—to impress all the property, real and personal, taken possession of by the Houston Oil Co. by virtue of said contract from September 28, 1925 to date, with a constructive trust with the Houston Oil Co. as trustee and Pratt-Hewit

Corporation as cestui que trust as of September 28, 1925.

THIRD—to cancel the stock of the Pratt-Hewit Corporation issued to Thos. H. Pratt for services alleged to have been rendered by him.

Relevant Facts as to Foregoing Points (a) (b) (c) (d)

(a) **As to Pratt being Disqualified from Representing the Pratt-Hewit Corporation in making the September 28, 1925, Contract.**

Pratt had disqualified himself from negotiating the September 28, 1925 contract in behalf of the Pratt-Hewit Corporation in that for several months before the contract was made he was having secret financial dealings with the Houston Oil Co. in which that company was abetting with its money Pratt's betrayal of his corporation.

By these dealings Pratt placed himself in a position where his personal interest conflicted directly with the duty he owed his corporation and its stockholders. His right to represent the Pratt-Hewit Corporation had come to an end the moment he tried to do the impossible of attempting to serve conflicting dual interests. Whether the deal was fair or unfair, or a fraud had or had not been perpetrated upon his corporation, is immaterial. In fact, as petitioners maintain and is shown by the written instruments exe-

cuted and made by the Houston Oil Co. and Pratt, and kept secret in the files of Pratt and the Houston Oil Co., it is apparent that a fraud was perpetrated upon Pratt's corporation and its stockholders. The acts committed are of such a character that they are per se fraudulent.

In December, 1939, about two months before the case went to trial, petitioners, through Court Order, were permitted to examine the books of the Houston Oil Co. Upon that examination it was learned for the first time that the Houston Oil Co. had accommodated Pratt with loans of money before and after the September 28, 1925 contract was made. The following are the dates and amounts of these loans:

June 6, 1925—$5,000; August 31, 1925—$5,000; October 1, 1925, two days after the September 28, 1925 contract was made, the two notes were consolidated into a $10,000 personal note of Pratt and payment extended; December 6, 1927—$2,000, and a fourth loan of $2,500 on December 23, 1931. This is according to the testimony of H. W. Fairbrother, supervisor of accounting of the Houston Oil Co. and the books of account of the Houston Oil Co. showing *personal loans* made to Thos. H. Pratt. (Tr. R. 768-780).

The foregoing list recites only a part of the bribes given. The Houston Oil Co. and its then president, E. H. Buckner, on January 1, 1926 paid to Thomas

H. Pratt in cash $51,071.40. This was accomplished by the artifice so frequently resorted to in the attempt to make the deal appear innocent and that is, to have a third party convey to the one to be bribed a piece of valuable property for an inadequate consideration, or none at all, and then have the briber come in and pay the bribe taker a lucrative price. That scheme was worked out in the following manner: F. B. Rooke and wife, who owned a 200 acre tract of land adjoining a lease belonging to the Pratt-Hewit Corporation on which the latter corporation had drilled two natural gas producers, each capable of producing more than 80,000,000 cubic feet of gas per day, (Tr. R. 836) gave to their son, A. D. Rooke, an oil and gas lease on said 200 acre tract on June 8, 1925.

Two days thereafter, to-wit: June 10, 1925, the Houston Oil Company and Rooke entered into a written drilling contract whereby the Houston Oil Co. agreed to drill an exploratory well on said 200 acre lease at its own expense on the condition that if the well should be a commercial producer of either oil or gas, then the Houston Oil Co. was to be permitted to operate the well until its production repaid the Houston Oil Co. for drilling and equipping the well, after which it was to move its drilling equipment from the lease and turn the lease over to Rooke. If the well should prove to be dry, then the Houston Oil Co. must take the entire loss. Remember, the Houston Oil Co. had no interest in the lease. The contract provided that if the well should be a producer, then the Houston Oil Co. reserved the right to

purchase the oil or gas at the current market price. (Exhibit 10, Tr. R. 916-924).

On August 29, 1925, a second contract like the other one, except that it provided for drilling two wells instead of one, was entered into between the Houston Oil Co. and Rooke. (Exhibit 10A, Tr. 924.

On November 13, 1925, A. D. Rooke assigned to Pratt an undivided ½ interest in said 200 acre lease and in addition to the contract provided that Pratt was to be subrogated, to the extent of his ½ interest in said 200 acre lease, to the rights of A. D. Rooke in the two free drilling contracts which A. D. Rooke had with the Houston Oil Co. (Exhibit 11, Tr. R. 933-936).

> Rooke testified: "Mr. Pratt didn't pay him any money consideration for the property." (Tr. R. 836).

However, it will be shown that Rooke had written up a conveyance to Pratt, the same as this one, sometime between the dates of the said two drilling contracts, but that when it was decided that a second drilling contract was to be made, the conveyance was torn up because the conveyance which he was to give Pratt should include the ½ interest right in the second drilling contract as well as in the first. (Tr. R. 836).

Without anything transpiring to increase the value of the lease, on January 1, 1926, the Houston

Oil Co. paid Pratt $32,500 in cash for an undivided 7/32 interest in said 200 acre lease. (Exhibit 12, Tr. R. 937-940). On the same day E. H. Buckner, the then president of the Houston Oil Co., paid Pratt $18,571.40 for a 4/32 interest in the 200 acre lease. (Exhibit 13, Tr. R. 940-944). For these interests Pratt paid nothing, as Rooke himself testified, supra.

On June 8, 1933, the two drilling contracts made between the Houston Oil Co. and A. D. Rooke, in which Pratt was given a half interest, were, in writing, modified, enlarged, and continued in force and effect by the Houston Oil Co., Rooke, and Pratt. (Exhibit 37, Tr. R. 973-977).

None of the foregoing instruments, with the exception of the lease given by F. B. Rooke and wife to their son, A. D. Rooke, were ever placed of record. No explanation ever was offered as to why they were not recorded. Oil companies and men engaged in the oil business never fail to record oil leases and assignments of them. It is the only way in which they can protect themselves from innocent purchasers

Including the foregoing, there were at least 18 Overt Acts committed between the Houston Oil Co. and Pratt in their conspiracy to defraud Pratt's corporation, the Pratt-Hewit Corporation. These are discussed at greater length on pages of appellants' motion for rehearing, pages 11 to 22 and in the Tr. R. 1054-1065. Unfortunately, in the mo-

tion for rehearing, page references are given to appellants' main brief and not to the Transcript of Record. Consequently, a list of these 18 Overt Acts of conspiracy is given with Transcript of Record paging.

OVERT ACTS

One—First conference between the Houston Oil Co., Pratt and Rooke. (Tr. 835-836 and 840-841).

Two—June 6, 1925 Houston Oil Co. loaned Pratt $5,000. (Tr. R. 769-780)

Three—June 8, 1925 oil and gas lease from F. B. Rooke and wife to A. D. Rooke. (Exhibit 9, Tr. R. 911-916).

Four—June 10, 1925, drilling contract between the Houston Oil Co. and Rooke executed. (Exhibit 10, Tr. R. 916-924).

Five—Between making of the first and second drilling contracts Rooke prepared an assignment by which he gave Pratt an undivided ½ interest in the lease and drilling contracts. (Exhibit 11, Tr. R. 835, 841). This was torn up.

Six—August 26, 1925. Drilling contract between the Houston Oil Co. and Rooke was executed. (Exhibit 10A, Tr. R. 924-932).

Seven—August 27, 1925. Pratt had directors of his corporation authorize him and Direc-

tor Sharp to institute a suit against Hewit and Pratt, himself, and one Seagraves, to cancel gas contract of April 16, 1923, given by Pratt-Hewit Corporation to Pratt and Hewit and assigned by them to Seagraves in 1924. This contract stood in the way of making the September 28, 1925 contract. (Tr. R. 716-717).

Eight—Second loan of $5,000 on August 31, 1925 by the Houston Oil Co to Pratt. (Tr. R. 769).

Nine—First producing well on the Rooke lease was a commercial producer and came in early in September, 1925. The leasehold income for that month was $7,268. One-half of this, according to Rooke's testimony, already belonged to Pratt by oral agreement. See Tr. of R. 836 and 837, Rooke's Testimony, Sharpe's letter of October 28, 1925, Exhibit 33, Tr. R. 968-972, and Fairbrother's testimony, Tr. R. 778-779).

Ten—September 28, 1925 contract executed. (Exhibit 4, Tr. R. 876).

Eleven—September 28, 1925, Pratt filed suit in Federal Court against himself, Hewit and Seagraves to cancel gas contract. (Tr. R. 720).

Twelve—October 1, 1925. Consolidation of two $5,000 loans into a $10,000 loan to Pratt by Houston Oil Co. (Tr. R. 769) and the time of payment extended.

Fairbrother, Houston Oil Co.'s supervising accountant, testified:

"Q. This was a loan *personally* to Thomas H. Pratt?

"A. That is right." (Tr. R. 769-770).

Thirteen—November 13, 1925. Rooke assigned an undivided ½ interest in his 200 acre lease to Pratt and Pratt was subrogated to Rooke's rights in the two drilling contracts and for which Pratt paid nothing. (Exhibit 11, Tr. R. 933-936). Rooke testified: "Mr. Pratt didn't pay him any money consideration for the property." (Tr. R. 836).

Fourteen—January 1, 1926. The Houston Oil Co. paid Pratt $32,500 for an undivided 7/32 interest in the 200 acre lease. (Exhibit 12, Tr. R. 937-940).

Fifteen—January 1, 1926. E. H. Buckner, president of the Houston Oil Co. paid Pratt $18,571.40 for an undivided 4/32 interest in the 20 acre oil and gas lease. (Exhibit 13, Tr. R. 940-944).

Sixteen—December 6, 1927. Third loan of $2,000 made to Pratt by the Houston Oil Co. (Tr. R. 770-771).

Seventeen—December 23, 1931. Fourth loan of $2,500 made to Pratt by the Houston Oil Co. (Tr. R. 770-771).

Eighteen (a) Drilling Contracts Exhibits 10 and 10A Modified, Enlarged, Ratified and Continued "In full force and effect" by the Houston Oil Co., Pratt and Rooke. (Exhibit 37, Tr. R. 973-977).

The foregoing instruments, with the exception of the lease of F. B. Rooke and wife to A. D. Rooke, were never put of record. It was, therefore, impossible for anyone to have discovered them for they were carefully kept secret in the private files of the Houston Oil Co. In December, 1938 Pratt's wife, Grace D. Pratt, his two daughters, Laura J. Shaw and Frances R. Webster, and Pratt's son, George P. Pratt, placed of record two instruments (Exhibit 39, Tr. R. 984-987 and Exhibit 38, Tr. R. 978-981) which recite Pratt's 3/32 interest in the Rooke 200 acre lease. These instruments were accidentally discovered of record in March or April, 1939 while search for some other records was being made by counsel for plaintiff Reed.

There was also found of record an assignment executed by E. H. Buckner in which the latter conveyed to the Houston Oil Co. his 4/32 interest in the Rooke 200 acre lease dated August 1, 1932, which he had received from Pratt in January, 1926 as has been described herein. This was put of record in January, 1935. (Tr. R. 951). This instrument gave additional information. In September or October, 1939, E. H. Buckner was shown certified copies of the last three instruments. He then stated that he had paid Pratt $18,000 for his undivided 4/32 interest

in the Rooke lease and that the Houston Oil Co. had paid Pratt $50,000 for its undivided 7/32 interest in the lease. With this aditional information coming from the president of the Houston Oil Co., who personally had negotiated the deal for his company with Pratt, it was felt that we then had sufficient information to commence the action. Suit was filed the 12th day of February, 1940. After suit was filed, upon Order of the Court, the Houston Oil Co. produced the bribing instruments just described and which were Exhibits 10, 10A, 11, 12 and 13, respectively.

Rooke conveyed to Pratt ½ of the leasehold interest in his 200 acre lease which represents a 7/8 or 28/32 interest of all the oil and gas in place under the lease, the remaining 4/32 being the ⅛ landowner's royalty. Pratt, therefore, originally owned a 14/32 of all the oil and gas in place underneath the 200 acres. He conveyed to the Houston Oil Co. 7/32 and to Buckner 4/32. This left Pratt an undivided 3/32 interest. This interest Pratt still owned at the time of his death. Rooke's assignment to Pratt of an undivided ½ interest in the 200 acre lease (Exhibit 11, Tr. R. 933-936) was never put of record and has never been discovered by the heirs as Grace D. Pratt's attorney stated in open court:

> "Morrow . . . the assignment from Rooke to Mr. Pratt, was lost. We don't know where it is or why it was never placed of record. We have never seen it." (Tr. R. 792).

Consequently, it was necessary that Pratt's wife

file an affidavit that Pratt had received such interest in the Rooke lease and still owned it at the time of his death, September 3, 1938. *Explanatory Note:* (In Mrs. Pratt's affidavit and her assignment to Pratt's son and two daughters the interest is described as a 3/28 in the leasehold interest which in amount is exactly the same as a 3/32 interest in all the oil and gas underneath the lease, which represents both the leasehold and the landowner's interest).

Pratt's wife divided this with the two daughters and son of Pratt so that each of the four now own a ¼ of the 3/32. This interest is still producing considerable oil and gas and has produced continually ever since the first of September, 1925. Consequently, Pratt received his monthly check every month from September, 1925 until his death. During all that time he was the one resident official who represented the Pratt-Hewit Corporation in all its dealings with the Houston Oil Co.—the only company with which the Pratt-Hewit Corporation had any business.

After Pratt's death on September 3, 1938, the income from the 3/32 which Pratt had owned in the Rooke 200 acre lease was and is still being paid to his heirs, the son, George P. Pratt, and the daughters, Frances R. Webster and Laura J. Shaw.

Fairbrothers, the Houston Oil Co's supervising accountant, testified as follows:

"By. Mr. Bartelt.

"Q. To whom does Thomas H. Pratt's royalty go now?

"A. That goes to—I am not sure of the names of all of them—Grace D. Pratt and George P. Pratt and Mrs. Frances R. Webster and one or two other interests, or one other."

"Q. That is being paid every month?

"A. Yes." (Tr. R. 780).

Ever since January 28, 1939, the husband of Laura J. Shaw, M. A. Shaw, has been the president of both the Delaware and the Texas Pratt-Hewit corporations and during the same time has been a director of each one of those corporations. (Tr. R. 781). The Pratt-Hewit Corporation is dealing daily with the Houston Oil Co. The wife of the President of the two corporations and her sister and brother, even while this case is pending, are receiving checks each month from the Houston Oil Co. The bribery and the conflict between private interest and duty owed to the Pratt-Hewit Corporation still goes on with the sanction of the United States District Court and the United States Circuit Court of Appeals of the Fifth Circuit.

It is charged in plaintiff's second amended complaint, paragraph 21, that Pratt had received "about $125,000 or more" from his 3/32 undivided interest. (Tr. R. 330). In the same paragraph

plaintiff, using what information Buckner had given, charged that Buckner paid Pratt $18,000 for his 4/32 and the Houston Oil Co. paid Pratt $50,000 for its 7/32.

The Houston Oil Co., in its answer (Tr. R. 371) to the said allegations in said paragraph 21 of plaintiff's second amended complaint, admitted the execution of said assignments by Pratt to the Houston Oil Co. and Buckner, and then stated that the assignments were reasonably worth the price paid —thus admitting that the price paid for the 7/32 was $50,000 instead of $32,500 as recited in the instrument. As to the allegations that Pratt received "about $125,000 or more" the answer is silent and, therefore the allegations are admitted. How much more he may have received is not known.

(b) As to the September 28, 1925 Contract Unlawfully Delegating Powers Belonging to Directors of the Pratt-Hewit Corporation to the Directors of the Houston Oil Co.

By the September 28, 1925 contract the directors of the Pratt-Hewit Corporation unlawfully attempted to delegate all the powers and discretion vested in them by the charter of the corporation and the laws of Texas and Delaware, to strangers, the officials and directors of the Houston Oil Co., a competitor.

The following two paragraphs of the September 28, 1925 contract show that Pratt and his co-direc-

tors attempted to abdicate their right and their duty to manage the affairs of their corporation to the directors of the Houston Oil Co:

"Upon the conveyance to Third Party (Houston Oil Co.) by First Party (Pratt-Hewit Corporation) of said undivided one-half (½) interest, Third Party shall have the EXCLUSIVE RIGHT TO OPERATE AND PRODUCE oil, and/or gas, from the wells on said property, and to the use of the equipment used in connection with said wells, and to contract to sell, and sell such production, receive the proceeds of sale, and do any and all things in connection with the handling and management thereof AS THIRD PARTY MAY DEEM BEST. THIRD PARTY SHALL ALSO HAVE THE EXCLUSIVE RIGHT TO DRILL OTHER WELLS for the production of oil and/or gas, on said property, and Third Party shall proceed to develop and produce oil and/or gas therefrom as and IN THE MANNER THIRD PARTY MAY DEEM BEST. *The intention being that the opinion and judgment of Third Party as to such developments SHALL CONTROL.*

"All of the costs and expenses incurred by Third Party in operating and producing oil and/or gas from the wells now on said property, and in drilling additional wells and producing oil and/or gas therefrom, and in marketing such oil and/or gas and ALL other COSTS AND EXPENSES incident thereto, by reason thereof, SHALL BE BORNE ONE-HALF (½) BY FIRST PARTY AND ONE-HALF BY THIRD PARTY. The proceeds of the sale of the oil and/or gas, from all such wells shall be owned

one-half (½) by First Party and one-half (½) by Third Party." (Tr. R. 880-881).

An analysis of the astounding provisions of these two paragraphs will show that the directors and officials of the Pratt-Hewit Corporation, by this contract, divested themselves of all power, authority and discretion, leaving with themselves nothing more than a clerical function namely, to distribute profits to the stockholders of the Pratt-Hewit Corporation if and when the Houston Oil Co. should turn any over to them. From September 28, 1925 until the trial of this case, which was about March 1, 1941, a period of about fifteen and a half years, the officials of the Pratt-Hewit Corporation have had the privilege of distributing profits eight (8) times, as follows: "four paid in 1940, one in 1939, and the other four were paid prior to that." (Tr. R. 707). The total amount distributed during the period of 16 years from 1925 to 1941 was only 8½%. Why should there be any annual meetings of stockholders for the election of directors when the management of the affairs and business of the corporation is vested in the officials and directors of the Houston Oil Co.? There is no time limit in the contract. If it is valid, it will be effective as long as oil and gas is being produced.

(c) As to the September 28, 1925 Contract Violating the Usury Statute of Texas.

The September 28, 1925 contract was neither an oil and gas lease nor an oil and gas operating contract, but was nothing more than a contract for the

loaning of money by the Houston Oil Co. to the Pratt-Hewit Corporation. (Exhibit 4, Tr. R. 876). In fact the interest was far more than 6 per cent but that rate plus a ½ interest in 23,000 acres of oil and gas leases with the two large producing gas wells on the acreage, much drilling equipment, pipe line, etc., thus bringing the interest rate far above the 10 per cent allowed by Texas Statutes.

The contract called for four loans to be executed to the Pratt-Hewit Corporation by the Houston Oil Co., each provided for interest at six percent, was made payable at a definite time, and each note was secured by the Pratt-Hewit Corporation giving a mortgage on all of its property, real and personal, to Houston Oil Co.

For the making of these loans, the Houston Oil Co., in the September 28, 1925 contract, exacted a bonus from the Pratt-Hewit Corporation in requiring the latter to convey to it an undivided ½ interest in 23,000 acres of oil and gas leases owned by the Pratt-Hewit Corporation which had on the acreage two big producing natural gas wells, each capable of delivering into the pipe line about 80,000,000 cubic feet of gas each 24 hours (Tr. R. 836), and a ½ interest in all the drilling and other equipment of the Pratt-Hewit Corporation.

The loans extended to the Pratt-Hewit Corporation by the Houston Oil Co. were all paid when they became due.

There was one provision in the September 28, 1925 contract which provided that as to the said two gas wells, No. 4 and No. 6, drilled and brought in by the Pratt-Hewit Corporation itself before the September 28, 1925 contract was executed, the proceeds from the first production coming from these two wells, to the extent of the value of $120,000, the Houston Oil Co. (it being in complete charge of this production, pursuant to the provisions of said contract) was to apply the same to the paying to itself the principal and interest of the four loans provided for in said September 28, 1925 contract.

This taking over of $120,000 worth of natural gas by the Houston Oil Co. and applying it on the loans Pratt-Hewit Corporation owed it, can in no wise be deemed a consideration validating the September 28, 1925 contract. . . . All of the $120,000 worth of gas was to come from the gas underneath the leases and the two producing wells which were the property of the Pratt-Hewit Corporation and in which the Houston Oil Co. had no interest, and never had an interest. To argue that the one-half of this production is the property of the Houston Oil Co. is to assume that the said contract is valid which is the subject in dispute and, therefore, begs the question at issue. It is no detriment or sacrifice of a single dollar for the Houston Oil Co. to give back to the Pratt-Hewit Corporation that which the Pratt-Hewit Corporation had just given it and which, in the first place, the Houston Oil Co. had no right to exact from the Pratt-Hewit Corporation because forbidden by the usury

statutes of Texas, Art. 5069, of the 1925 Texas Statutes, which says:

> "Usury is interest in excess of the amount allowed by law (10 percent); all contracts for usury are contrary to public policy and shall be void."

Not one single dollar of its own money, therefore, was paid by the Houston Oil Co. for the one-half interest which was attempted to be conveyed to it by Pratt and his co-officials in the making of the September 28, 1925 contract. Consequently the ½ interest conveyed to Houston Oil Co. by the Pratt-Hewit Corporation must be considered to be interest.

(d) The Contract Violating the Anti-Trust Law.

The two paragraphs of the September 28, 1925 contract, which, as has just been seen, have just been quoted as unlawfully delegating to the officials and directors of the Houston Oil Co. the management of the affairs of the Pratt-Hewit Corporation which is vested by the charter of the Pratt-Hewit Corporation under the laws of Delaware and Texas, with the directors and officials of the Pratt-Hewit Corporation, also violates the anti-trust laws of Texas. The effect of said contract and its two paragraphs just mentioned has been to put under one single management, namely, that of the officers and directors of the Houston Oil Co., the production, marketing, and complete disposi-

tion of all the oil and gas which has been produced and is being produced under the 23,000 acres of oil and gas leases which originally consisted of approximately 23,000 acres of oil and gas leases.

Under the September 28, 1925 contract, the Houston Oil Co. has the right to say when or where, or if any wells should be drilled on the 23,000 acreage of oil and gas leases. Furthermore, by the same contract, the Pratt-Hewit Corporation had contracted away its right to market and determine the price at which the Pratt-Hewit Corporation sold its gas and oil. The evil of the situation became more evident and far more serious when the Houston Oil Co. sold the gas to the defendant, the Houston Pipe Line Company, when, as a matter of fact, the Houston Pipe Line Company is the mere instrumentality, the second self, the alter ego of the Houston Oil Co. This charge made by petitioners in paragraph 28 of plaintiff's Second Amended Complaint, is not denied by the Houston Oil Co. Thus the Houston Oil Co. sold this gas to itself and fixed the price.

"Paragraph 28 of plaintiff's second amended complaint reads as follows: (Tr. R. 336-337).

> "(28) The plaintiff alleges the allegations in this paragraph upon information and belief, as follows: The Houston Pipe Line Company is the second self—the alter ego—of the Houston Oil Company. The latter owns all the stock of the former and brought about its incorporation and furnished it with funds. The two com-

panies have the same directors, except that the Houston Pipe Line has fewer in number. The two companies have the same secretary and treasurer. They also have the same office files and occupy the same office space. Each year the two companies issue a joint financial set-up. The officers and directors of the parent company, the Houston Oil Company, dominate and control the affairs and business of the Houston Pipe Line Company so that the latter is but a mere instrumentality and a screen for the other. The Houston Pipe Line Company on or about March 12, 1925 was organized by the Houston Oil Company about the same time that the contract of September 28, 1925 was being contemplated by the officials of the Houston Oil Company and Thomas H. Pratt. The natural gas which the Houston Oil Company, since September 28, 1925, produced and now produces from the wells it operates on the Pratt-Hewit Oil Corporation (Delaware) properties, is sold by the Houston Oil Company to the Houston Pipe Line Company which perpetrates a fraud, in that it represents that it is selling the gas of the Pratt-Hewit Oil Corporation (Delaware) to a third, separate and distinct party, when, in fact, the transaction means a sale of gas to itself and that the Houston Oil Company is both buyer and seller and has absolute power to fix the prices and also to make a charge in the nature of a profit in the marketing of the gas which the September 28, 1925 contract forbade. Plaintiff alleges on information and belief that these facts Thomas H. Pratt knew and the directors of the Pratt-Hewit Oil Corporation (Delaware) now know, but they have never informed the stockholders of such a condition, nor have they ever made an attempt to correct the same.

The answer of the Houston Oil Company and the Houston Pipe Line to that paragraph is given in the record on pages 373 and 374, Tr. R. as follows:

"(28) As to Paragraph 28 thereof; and (Tr. R. 373)

"(29) As to Paragraph 29 thereof:

"these defendants allege that the Houston Pipe Line Company is a separate and distinct corporation from the Houston Oil Company of Texas, and that it was incorporated under the laws of the State of Texas, and that though some of the officers and directors of the two corporations are the same, each has it own offices and records, and each conducts its own business, and that Pratt-Hewit Oil Corporation has always been credited with the fair reasonable and adequate price for all of the oil and gas produced from the properties covered by the contract, and in accordance with the contract, and these defendants deny that said contract was fraudulently entered into and they deny that any transactions thereunder have been made in fraud; and these defendants further deny that the proceeds which the Houston Oil Company of Texas has acquired by reason of the production of oil and gas from the properties covered by the contract are owned by anyone else, and these defendants say that such proceeds are not held in trust for any one else." (Tr. R. 374).

SOME ADDITIONAL EXPLANATORY FACTS

This was an oil venture promoted by Thomas H. Pratt and one W. E. Hewit. It was started in 1920. The enterprise was financed by selling oil and gas lease acreage located in Refugio County, Texas, to investors who, with a few exceptions, lived in Wisconsin. Although at that time there was no commercial production of either oil or gas in Refugio County, and leases, therefore, had no market value, nevertheless, the lease acreage, as testified to, sold at a price ranging from $25 to $100 per acre. (Tr. R. 609 and 739-741). Mr. Vaughan, the attorney for the Pratt-Hewit Corporation, stated in court that there were approximately 500 lease acreage purchase contracts made. (Tr. R. 675). If the average number of acres purchased by each investor was 20, and the average price paid per acre was $50 per acre, then the total amount raised was $500,000. The records of these purchases of acreage were not available because they were destroyed when the shack in the oil field at Refugio in which they were kept was destroyed by fire in 1923. (Tr. R. 610, 611).

In 1923 the Pratt-Hewit Corporation (Delaware) was organized with a capitalization of 5,000,000 shares, each of the par value of One Dollar. The stock distribution was substantially as follows: Pratt, 1,125,000; Hewit 1,125,000; lease acreage buyers who furnished all the money with which the enterprise was financed, 1,125,000; about 325,000 shares for services rendered by various other parties;

and about 500,000 left in the treasury of the corporation.

In July, 1924 Pratt had Hewit ousted as president and member of the board of directors. This left Pratt in sole charge of the affairs of the Pratt-Hewit Corporation.

Pratt's daughter, Laura J. Shaw, and her husband, M. A. Shaw, and daughter, Frances R. Webster, and the son, George P. Pratt, were made defendants because they received most of Pratt's stock by gift or by inheritance. They are residents of Nebraska and could not be served, and refused to make their appearance voluntarily. The second amended complaint asked for cancellation of Pratt's stock. Consequently, the son and daughters and the husband of Laura J. Shaw, and M. A. Shaw, all of whom had received stock, were proper but not indispensable parties.

The Pratt-Hewit Corporation (Delaware) and Pratt-Hewit Corporation (Texas), through their officials, which are the same, vigorously fought this action because no demand was made upon them before the action was instituted. Plaintiffs, however, had specificially set out in the second amended complaint why no demand was first made and further, gave reasons why it would have been futile to have done so. However, in the Circuit Court of Appeals, the two Pratt-Hewit corporations filed a short brief of 12 pages containing no legal argument, but only explanatory statements and prayed as follows:

> "That this Court render, under the facts and law applicable to this case, whatever judgment it deems proper, and if these defendants are entitled to any recovery herein, directly or indirectly, that such recovery be adjudicated to them."

(The foregoing prayer of the two Pratt-Hewit corporations, as contained in their brief in the Circuit Court of Appeals, automatically eliminated a number of legal questions).

The defendant, Pratt-Hewit Corporation of Texas, was organized in 1930 by the defendant, Pratt-Hewit Corporation of Delaware. With the exception of four or five shares, the latter owns all the stock of the former. The attorney for the two corporations, Ben F. Vaughan, Jr., admitted that the Pratt-Hewit Oil Corporation of Texas is the alter ego of the Pratt-Hewit Corporation of Delaware. (Tr. R. 745-747).

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of Texas and was argued by counsel on the 9th day of November, 1942. (Tr. R. 1043). On the 8th day of January, 1943 the Circuit Court of Appeals affirmed the decision of the District Court. (Tr. R. 1041). On January 29, 1943 a petition for rehearing was filed, (Tr. R. 1041) which was denied, without opinion, on February 17, 1943. (Tr. R. 1082).

It is from said judgment of the Circuit Court of

Appeals, Fifth Circuit, that petitioners apply to this Honorable Court for a writ of certiorari.

II

JURISDICTION

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals for the Fifth Circuit in this case on certiorari by virtue of 28 U. S. C., Section 347 Jud. Code, section 240, amended) and also by virtue of Rule 38, 5(b) of the Revised Rules of this Honorable Court.

The amount in controversy in this case is greatly in excess of $3,000, for it was testified that approximately 60, or more, wells have been drilled on the leases involved in this case.

III

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals has decided an important question of local law in affirming the judgment of the District Court because that Court found "no fraud" in the evidence adduced at the trial by plaintiffs, thereby holding that the question of whether there was or was no fraud is the deciding issue of the case, is in a way probably in conflict with the law which obtains in Texas which says that when an officer of a corporation, or any other

fiduciary, places himself in a position where self-interest conflicts with duty, that moment the fiduciary relationship comes to an end regardless of whether the contract or the transaction was fair or unfair, or whether the transaction was unaccompanied by any damage and that "a court of equity does not concern itself with the question whether the opportunity was embraced and the principal lost no money." That is what was held by the Supreme Court of Texas in the case of *Nabours* v. *McCord*, 97 Tex. 526, 80 S. W. 595-598.

2. Whether the Circuit Court has decided an important question, by holding that, before a fiduciary's relationship to his beneficiary may be terminated, it must first be shown that the fiduciary has perpetrated a fraud upon the beneficiary, a question of exceedingly great importance, because it lies at the basis of the law pertaining to fiduciaries and cestui que trusts wherever that relationship arises, in a way in conflict with the principle followed by this Court when it said, in the case of *Wardell* v. *Union Pacific Ry. Co.*, 103 U. S. 651, 26 L. Ed. 509:

> "Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of the parties they represent and are bound to protect."

Said decision is likewise, in conflict with universal-

ly accepted infallible principle of human conduct that a man cannot serve two masters.

3. Whether the decision of the Circuit Court is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit concerning the same legal proposition involved in the case of *Fleishhacker* v. *Blum*, 109 F. (2d) 543, and also whether it is in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit on the same legal question in the case of *Shell Petroleum Co.* v. *Pratt*, 100 F. (2d) 833, which are to the effect that the Court will not listen to proof of honest intent, good faith, or that the beneficiary suffered no injury, but will set the contract aside. In the instant case the Circuit Court affirmed the judgment of the District Court because Pratt perpetrated no fraud, and, therefore, could not be disqualified from representing his corporation in his dealings with the Houston Oil Co.

4. Whether the Circuit Court has decided an important question of local law in holding that there was no fraud and thereby dismissing the case, and in its failing to mention or discuss the question which was presented to it, namely, whether the September 28, 1925 contract unlawfully delegated to the directors and officials of the Houston Oil Company the right to manage the affairs of the Pratt-Hewit Corporation, and thereby answering said question in the negative, is in conflict with the charter of said corporation, and also in conflict with the

applicable statutes and decisions of the courts of Texas, including its Supreme Court.

5. Whether the Circuit Court of Appeals, in failing to pass upon the issue of whether the officials of the Pratt-Hewit Corporation had contracted away their right and duty to manage the affairs of their corporation to the directors of the Houston Oil Co., thereby impliedly answering in the negative a question of great corporate and economic importance is in a way, probably in conflict with the decisions of this Court, as held in the case of *Thomas* v. *R. R. Co.*, 101 U. S. 71, and other decisions of this Court on the same question.

6. Whether the decision of the Circuit Court in its failure to pass on the question of whether the September 28, 1925 contract unlawfully delegated powers to the directors of the Houston Oil Co., and by its failure to pass on that question impliedly answered it in the negative, is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *Sherman-Ellis, Inc.* v. *Indiana Mutual Gas Co.*, 41 F. (2d) 588, in which the same question was answered in the affirmative. Silence, as well as a written opinion, on decisive issues may create a conflict of decisions.

7. Whether the Circuit Court has decided an important question of local law presented to it, that is, did the September 28, 1925 contract violate the Usury Statutes of Texas, and by its failure to pass on that question has impliedly answered it in the negative, in conflict with the Texas Usury Sta-

tutes and the applicable decisions of the Supreme and other courts of Texas.

8. Whether the Circuit Court has decided an important question of local law presented to it, whether the September 28, 1925 contract violated the monopoly and anti-trust statutes of Texas, and by its failure to pass on that question impliedly answered it in the negative, has given a decision in conflict with the monopoly and anti-trust statutes of Texas and the applicable decisions of the Supreme Court and other courts of Texas.

9. Whether the decision of the Circuit Court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by the District Court as to call for an exercise of this Court's power of supervision in that

(a) the decision of the Circuit Court is misleading, in making it appear that the issue in the case is a question of fact, and the District Court having found that there was no fraud, the finding would be as conclusive on the Circuit Court of Appeals as if it had been the finding of a jury, when the record clearly shows that the facts are undisputed and that the issues are all questions of law;

(b) the four questions not answered by the Circuit Court raised jurisdictional questions and lack of jurisdiction is one which every court should consider whenever and however it is raised; and

(c) answering the four questions presented by the pleadings and the undisputed evidence and exhibits in the case by implication, that is, by not discussing them, is contrary to long settled procedure of courts and unconstitutionally denies petitioners of their right to relitigate said questions.

IV

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

As to "Question Presented No. 1," the affirmance by the Circuit Court of the District Court's finding that there was "no fraud," shown in the evidence adduced at the trial of the case, is directly in conflict with the decision of the Supreme Court of Texas in the case of *Nabours, et al* v. *McCord, et al*, 80 S. W. 595, which is to the effect that a fiduciary's right of representation of his beneficiary comes to an end the moment the fiduciary places himself in a position where self-interest conflicts with duty, and that when such conflict is shown the Court will not stop and determine first whether the beneficiary has been damaged, or the fiduciary has profited, or whether the transaction or contract was fair or unfair.

In this case the Supreme Court of Texas said:

> "No man can in this court, as an agent, be allowed to put himself into a position in which his interest and his duty will conflict." p. 600.

> "The court will not inquire, and is not in a position to ascertain, whether the bank had lost or not lost by the act of the directors." p. 600.

Quoting from the case of *Cook* v. *Berlin Woolen Mill Co.*, 43 Wis. 33, the Supreme Court of Texas further said:

> "The rule forbidding conflict between interest and duty is no respecter of persons. It imputes constructive fraud, because the temptation to actual fraud, *and the facility of concealing it*, are so great. And it imputes it all alike, who come within its scope, *however much* or *however little* open to suspicion of actual fraud. Equity does not so much consider the bearing or hardship of its doctrine upon particular cases *as it does the importance of preventing a general public mischief*, which may be brought about by means *secret* and *inaccessible to judicial scrutiny*, from the dangerous influences arising from the confidential relation of the parties. The principle applies, however innocent the purchaser may be in a given case."

In Texas, officers and directors of corporations are trustees. "In the case of *San Antonio & G. S. R. Co.* v. *San Antonio & G. R. Co.*, 60 S. W. 338, writ of error was refused, it was said; 'Directors of a corporation occupy toward them the position of trustees, and their acts in connection with the property of the corporation as controlled by the principles governing other trustees, and the obligations of the trusteeship are made the basis for the ascertainment of what acts on the part of directors will

constitute a fraud, and the remedies that may be applied.'

Other Texas cases are to the same effect, and in no case is the correctness of that statement questioned." Hildebrand's, Texas Corporations, Vol. 3, p. 2, section 681 (Published 1942)

Justice Cardoza, while on the New York State Bench, in one of his outstanding opinions, clearly stated the principle followed by the courts in all jurisdictions when he said:

> "Finally, we are told that the brokers acted in good faith, that the terms procured were the best obtainable at the moment, and that the wrong, if any, was unaccompanied by damage. This is no sufficient answer to a trustee forgetful of his duty. The law 'does not stop to inquire *whether the contract or transaction was fair or unfair.* It stops the inquiry when the relation is disclosed, (conflict of self-interest with duty) and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, *without undertaking to deal with the question of abstract justice in the particular case.*' (Munson v. Syracuse, G. & C. R. Co., 103 N. Y. 58, 74)
>
> " . . . . .) Only by this *uncompromising rigidity* has the rule of undivided loyalty been maintained against *disintegrating erosion.*" Wendt v. Fischer, 243 N. Y. 328, 443, 154 N. E. 303, 304.

While the phraseology is somewhat different, nevertheless, the principles laid down in the case of *Nabours, et al* v. *McCord et al* (supra) is the same as the principles followed by Justice Cordoza in the case of *Wendt* v. *Fischer* (supra). Each case is to the effect, *first*, that the moment when self-interest conflicts with duty the fiduciary's right of representation comes to an end, and, *second*, that the court goes no further for the purpose of ascertaining whether there was fraud or that the violation of duty by the fiduciary was accompanied by damage but sets aside the transaction or contract and refuses to enforce it.

Thus, the question which was presented to the District Court and also to the Circuit Court whether Pratt had placed himself in a position where self-interest conflicted with duty, has not been passed upon directly by either the District Court or the Circuit Court. The fact that said two courts did not mention said principle must be taken to mean that both of said courts hold that before a fiduciary may be disqualified from representing his beneficiary it must be shown that a fraud has resulted from the fiduciary attempting to serve dual interests.

As to Question No. 2, there is an important public interest reason why the principles of law as pronounced by this Court in *Wardell* v. *Union Pacific Ry. Co.* (supra) and in many other cases, by the case of *Nabours* v. *McCord* (supra) and by Justice Cardoza, and not the new principle by which the District Court decided the case at bar and which principle was approved and affirmed by the Circuit Court of

Appeals, should be adhered to by all courts with such inflexibility and stubborness because it lies at the base of every type of fiduciary relationship. Even any slight relaxation would result in endless confusion and much litigation. Furthermore, the frailty of human nature when tempted dictates its enforcement with extreme rigidity.

In the very recent case of *Blaustein* v. *Pan American, etc.*, 21 N. Y. S. (2d) 651, 722, involving the Standard Oil Company of Indiana and its subsidiary, Judge Rosenman said:

> "The rule is based upon the public policy of removing temptation completely from the office of fiduciary, so that it will not be necessary to determine whether it was the interest of the trustee or his sense of duty that prevailed. Different courts have defined this rule in different words, but in unanimity of substances."

In the case of *Wile, et al* v. *Burns*, 265 N. Y. S. 461, the court said:

> "They say that they have clearly established that no one occupying a fiduciary relation, such as that of director of a corporation, should place himself in a position where his self-interest *will* or *may* conflict with his duties as trustee, and that, if he does do so, his right to represent his cestui ceases at once.
>
> "Authority for that proposition is to be found in Munson et al v. Syracuse, Geneva & Corning Railroad Co., 103 N. Y. 58, 74, 8 N. E. 355, 358,

> in which the court said: . . . . . 'The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction, or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them as far as may be, impossible, *knowing that real motives often elude the most searching inquiry, and it leaves neither to judge nor jury the right to determine upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall.* . . . . . The value of the rule of equity, to which we have adverted, lies to a great extent in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealings on the part of the trustees, by vitiating, without attempt at discrimination, all transactions in which they assume the dual character of principal representative."

In the case of *West* v. *Camden*, 135 U. S. 507, 10 S. Ct. 838, 34 L. Ed. 254, the agreement was one made personally by a director and stockholder of defendant corporation that West should be permanently retained as vice-president of that company. It was not an agreement of the corporation itself. Inasmuch as its breach might readily be presumed to result in personal liability for damages, the agreement was of a character to place defendant's personal in-

terests in possible conflict with the best interests of the corporation and its stockholders, and, as plaintiff knowingly dealt with defendant with respect to the subject matter touching his fiduciary relationship to the stockholders, the contract was manifestly void as against public policy, even though there would not have been any direct gain from the promisor, the defendant.

The facts thus clearly disclose that this contract was against public policy and void for one sole reason, that is, it placed defendant's interest in direct conflict with the duty he owed to his corporation's stockholders.

> "The rule is founded on the danger of imposition and the presumption of the *existence of fraud inaccessible to the eye of the court.* The policy of the rule is to shut the door against temptation, and which, in the cases in which such relationship exists, is deemed to be itself sufficient to create the disqualification." Nabours v. McCord, 80 S. W. 595, 598, 599 (Tex. Sup. Ct).

In the same case of *Blaustein* v. *Pan American, etc.*, (supra) p. 717, Justice Rosenman, in discussing the case of *Jackson* v. *Smith*, 254 U. S. 56, said:

> "It thus appeared that even though the estate was not injured, since no higher bid could have been obtained; that even though there were no prospective profits taken away from the cestui; that even though Wilson's bid was not influenced in any way by the trustee; *the mere fact that the trustee had placed himself in a position where*

self-interest conflicted with the interest of the cestui was sufficient to cause the whole transaction to be set aside."

Question 3. The decision of the Circuit Court in sustaining the finding of the District Court that there was *no fraud* and, therefore, dismissing the case, implied that it was necessary to charge and prove that Pratt had been guilty of fraud before he would be disqualified from representing the Pratt-Hewit Corporation.

(a) is in conflict with the Circuit Court of Appeals for the Ninth Circuit in the case of *Fleishhacker* v. *Blum*, 109 F. (2) 543 on the same legal question, and in which that court affirmed the case insofar as it affected Fleishhacker, and in which said District Court said: *Blum* v. *Fleishhacker*, 21 F. Supp. 527.

> "The law will not allow private profit from a trust, and will not listen to any proof of honest intent, or proof that the dealing was for the best interest of the beneficiary, but will set the transaction aside at the mere option of the cestui que trust."

In the same case the District Court further said, in its opinion:

> "It is further contended that Herbert Fleishhacker acted in the highest good faith for the protection and benefit of the Anglo and that the two loans were highly desirable to the bank; that there was no secrecy in Fleishhacker's participation in the steel venture.

Court held that this was no defense.

(b) is in conflict with the decisions of the Circuit Court of Appeals for the Tenth Circuit on the same matter in the case of *Shell Petroleum Co.*, 100 F. (2d) 833 in which the Court said:

> "It must be held upon plain principles of reason and sound public policy that an agent occupying a place of trust and confidence is not permitted to put himself in a position in which his personal interest may conflict with his duty to his principal. He cannot assume a position which may afford the temptation to subordinate the interests of his principal to those of himself in the discharge of his duty. In order to be free from temptation *he is disabled from placing himself in such a position.* United States v. Cartel, 217 U. S. 286, 30 S. Ct. 515, 54 L. Ed. 769; Commonwealth Finance Corp. v. McHarg, (2 Cir.) 282 F. 560."

> ". . . . . It is further insisted that a trust should not have been imposed for the reason that *there was no proof that plaintiff suffered detriment or damage* as the result of defendant acquiring the mineral rights. In order to warrant the imposition of a constructive trust, the evidence that a fiduciary relationship existed, and that it was breached must be clear, convincing, and trustworthy. Colorado & Utah Coal Co. v. Harris, 97 Colo. 309, 49 P. (2d) 429. But such a trust 'is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, *equity converts him into* a trustee.' Beatty v. Guggenheim Exploration Co. 225 N. Y. 380, 122 N. E.

378, 380; Quinn v. Phipps, 93 Fla. 805, 113 So. 419, 54 A. L. R. 1173. *It was not necessary for plaintiff to show that it suffered detriment, injury, or damage.* The law was indutiably contravened by the creation of a stituation which lent inducement or temptation for wrongdoing; and *a court of equity does not concern itself with the question whether* the opportunity was embraced and *the principal suffered actual injury.* Hoyt v. Latham, 143 U. S. 553, 12 S. Ct. 568, 36 L. Ed 259; Robertson v. Chapman, 152 U. S. 673, 14 S. Ct. 741, 38 L. Ed. 592; United States v. Dunn, 268 U. S. 121, 45 S. Ct. 451, 69 L. Ed. 876; Turner v. Kirkwood, (10 Cir.) 49 F. (2) 590; Daus v. Short, supra; Selwyn & Co. v. Waller, 212 N. Y. 507, 106 N. E. 321, L. R. A. 1915B, p. 160.

Question 4. The decision of said Circuit Court of Appeals affirming the decision of the District Court in dismissing plaintiffs' cause of action on the sole ground that "there was no fraud," and in failing to pass on the question whether the September 28, 1925 contract unlawfully delegated the managing rights of the officers of the Pratt-Hewit Corporation to the directors of the Houston Oil Co. is a decision of local law in a way probably in conflict with the following statutes and decisions of the courts of Texas:

ART. 1327 Texas Vernon Statutes:

> "The directors shall have the general management of the affairs of the corporation, etc." (See many cases cited in note).

"The general management of the affairs of a corporation having been intrusted by the legislature to the board of directors, it accords with the general principle to hold that their functions may not be delegated to others." 10 Tex. Jur. 954, Section 303.

"Upon this statement the question arises, can the board of directors of a corporation, under a charter which imposes upon it the entire management of its affairs, confer that authority upon an executive committee, to be appointed by the president of the company? Undoubtedly, the board of directors can appoint agents, whether in the form of committees or as single agents, to transact the ordinary business of the corporation; *but we believe that the rule is well settled by authority, and sustained by sound principle, that a board of directors cannot confer upon others the power to discharge duties imposed upon them which involved the exercise of judgment and discretion, except* in the transactions of ordinary business of the corporation, unless authorized so to do by the charter. Thomp. Corp. sect. 3944 et seq.; Green's Brice, Ultra Vires pp. 490-492; Railroad Co. v. Richie, 40 Me. 425; Tippets v. Walker, 4 Mass. 595; Weidenfeld v. Railroad Co., 48 Fed. 615. The by-laws in express terms substituted the executive committee, to be appointed by the president, for the board of directors, *and attempted to confer upon that committee all powers given by the charter to the board of directors. Such a provision in the by-laws is so palpably in conflict with the charter under which the corporation was organized that there could scarcely be a question that the by-laws* would be null." Temple v. Dodge et al, 32 S. W. 514 (Supreme Ct. of Texas).

> "The power to manage the affairs of the corporation was placed by statute and by charter in the board of directors (Art. 1327 R. S. Texas, 125), and such authority cannot be delegated to another (Temple v. Dodge, 32 S. W. 514, 33 S. W. 222), and those who deal with a corporation are charged with knowledge of the limitations upon its powers prescribed by its charter." Farmers' Gin Co. v. Kasch, 277 S. W. 746, 749 (Tex. Civ. App.).

Furthermore, in *Temple* v. *Dodge*, 89 Tex. 69, 32 S. W. 514, 33 S. W. 222, it was held, that the board of directors cannot delegate to others authority to discharge the duties imposed upon them by law, involving the exercise of judgment and discretion except in the transaction of ordinary business of the corporation unless authorized so to do by its charter. To the same effect, see Fletcher on Private Corporations, Vol. 3, p. 31, 48." *Marchman* v. *McCoy Hotel Operating Co.*, 21 S. W. (2d) 552, 558 (Tex. Civ. App.)

> "The business of every corporation organized under the provisions of this chapter shall be managed by a board of directors, except as hereinafter or in its certificate of incorporation otherwise provided, etc." Corporations Art. 2041, sec. 9, Revised Code of Delaware, Laws of 1935.

The two paragraphs of the September 28, 1925 contract by which the said contract unlawfully delegates to the directors and officials of the Houston Oil Company the right to manage the business

affairs of the Pratt-Hewit Corporation are set out in full and a discussion of them is to be found on pages 25-30, inclusive, of appellants' Motion for Rehearing and pages 1068-1073 of the Transcript of Record. In order to avoid repetition, these page references to the appellants' Motion for Rehearing and Transcript of Record are given.

The said two paragraphs of the September 28, 1925 contract are also set out in the Summary Statement of Matters Involved on pages 17-18 of this Application for Certiorari, followed by a short discussion.

Question 5. The decision of the Circuit Court of Appeals in its failure to pass upon the question presented to it, held that the September 28, 1925 contract was not void even though the contract delegated to the directors of the Houston Oil Co. the right to manage the affairs of the Pratt-Hewit Corporation, an important question, not only as to the State of Texas but to the public in general, is not only in conflict with the statutes of Texas and the decisions of the courts of this state but is also in conflict with what has been held by courts in all jurisdictions and in particular in the case of *Thomas* v. *Railroad Co.*, 101 U. S. 71, 83, 25 L. Ed. 950.

The plaintiff Thomas, in the foregoing case, brought an action to enforce a contract which was in the form of a 20 year lease in which he was lessee and the Railroad Company lessor. The Railroad Company was the original owner. It had leased all its properties, including its franchise, for a period of 20 years to Thomas, from whom in return

it received as rent one-half of all gross earnings of the road. The usual right of entry was reserved to the Railroad Company in case Thomas breached his contract, etc. In the Circuit Court of Appeals Thomas offered to prove that he had complied with the provisions of the lease and prove his damage. But the Court excluded the testimony offered on the grounds the lease was ultra vires and directed the jury to return a verdict for the defendant Railroad Company. The Supreme Court of the United States affirmed the judgment. The following are quotations from the opinion: On page 83, the Court said:

> " . . . a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action.
> " . . . . . .

> "There is another principle of equal importance and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of ultra vires as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract.

> "That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the conditions of the public grant, any contract which disables the corporation from performing those

functions which it undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy."

The contract in the foregoing case of *Thomas* v. *Railroad Co.* is not as drastic as is the September 28, 1925 contract in the case at bar. The *Thomas* v. *Railroad* contract provides for a definite period of 20 years. The other does not, but continues as long as oil and gas is produced from the 23,000 acres of oil and gas leases involved in the September 28, 1925 contract. In the Thomas v. Railroad contract the railroad company was entitled to receive as rent one-half of the *gross income.* In the other Houston Oil Co. is obliged to turn over only such sums of the earnings as the Houston Oil Co. in its judgment alone shall deem to be net earnings and to decide when dividends, if any, may be paid to the stockholders of the Pratt-Hewit Corporation. That is a function which the directors of one corporation may not delegate to the directors of another. In the *Thomas* v. *Railroad Company* case, "a right of re-entry (was given) on the failure to perform covenants in addition to the special right to terminate the lease on notice."

No such right of re-entry, or termination of the contract is contained in the September 28, 1925 contract.

Question 6. The decision of the Circuit Court of Appeals which by its failure to answer the question presented, whether the September 28, 1925 contract delegating to the directors of the Houston

Oil Co. the right to manage the affairs of the Pratt-Hewit Corporation is lawful, is in conflict with the decision of the Circuit Court of Appeals for the 7th Circuit in the case of *Sherman & Ellis, Inc.* v. *Indiana Mutual Casualty Co. et al*, 41 F. (2d) 588, in which the court said:

> "It is true the statutes of the states authorizing the organization of corporations are of a general application and are easily complied with. Yet we cannot believe that the requirements therein found or the official duties therein prescribed are mere formalities or only directory in character. . . . . *The grant of a corporate power* by a state *is upon the hypothesis that these powers shall be* exercised by the corporation's officers, annually elected by the stockholders and not by the officers of another corporation. Anglo-American Land, etc. Co. v. Lombard (CCA) 132 F. 721, 736."

To the same effect is the case in the 7th Circuit, *McCutcheon* v. *Merz Capsule Co.*, 71 F. 787, 792 (CCA 6th).

Question 7. The decision of the Circuit Court of Appeals in failing to decide the question in its written opinion presented to it, namely, whether the September 28, 1925 contract violates the usury statutes of Texas, Articles 5069 and 5071, R. S., 1925, and the applicable decisions of the Supreme Court of Texas, and thereby answering said question, by inference, in the negative, is in conflict with said statutes of Texas and the decisions of the Supreme Court of said state construing said statutes. Said statutes read as follows:

"Art. 5069. Usury is interest in excess of the amount allowed by law (10 percent): *all contracts for usury are contrary to public policy and shall be void.*"

"Art. 5071. The parties to any written contract may agree and stipulate for any rate of interest not exceeding ten per cent per annum, on the amount of the contract, and all written contracts whatsoever, which may in any way, *directly or indirectly*, provide for a greater rate of interest shall be void and of no effect for the amount of the interest only; but the principal sum of money or value of the contract may be received."

Judge Hutcheson of the Fifth Circuit Court of Appeals, and who is a member of that Court coming from Texas, in the case of *Atwood* v. *Deming Inv. Co.*, 85 Fed. 180, a suit involving the just quoted Texas statute, said:

"For us the statute (Article 5071) has the meaning which the highest court has given it. We follow where the Court has led."

"The courts of Texas have always struck such contracts down, and neither sophistry of form nor substance has availed to save them. The reasons for this the Supreme Court of Texas in the cases referred to have been fully set out. We shall not attempt a restatement; a reference to those cases will suffice."

"The language of the statute, that such contracts shall be void as to interest, is imperative and absolute, not prospective and conditional.

> It provides not that the contract will, but that it shall, be void and of no effect as to interest. Such a statutory interdiction sweeps the provisions for interest out of the contract, and leaves it as though it did not stipulate for the interest." (p. 183)

The application of these statutes and decisions of the courts of Texas to the September 28, 1925 contract, means that the actual money, the principal checked out by the Houston Oil Co. out of its bank account must be and was paid back to the Houston Oil Co. by the Pratt-Hewit Corporation, for that part of the contract has the sanction of the law of Texas. The rest of the contract is completely condemned by the two Texas statutes just quoted and the decisions of the Texas Supreme Court. The void part includes two items which cover all the rest of the contract of September 28, 1925, namely, the 6 per cent interest provided for by the written loans and the undivided ½ interest in all the real and personal property conveyed to the Houston Oil Co. by Pratt-Hewit Corporation, according to Texas laws, is interest, thus bringing the rate above the 10 percent allowed. This makes the contract, as to all the interest, the 6 per cent as well as the undivided ½ interest conveyed to Houston Oil Co. by Pratt-Hewit Corporation, void. Thus, in fact, the Houston Oil Co. at no time acquired ownership of the ½ interest it received from the Pratt-Hewit Corporation.

In the case of *Manning et al* v. *Christianson et al* (Com. App. Tex.) 81 S. W. (2d) 54, the decision of

the Court of Civil Appeals was sustained when the Court said:

> "Entire interest is usurious if any part of interest is usurious." 59 S. W. (2d) 234, in the following language:
>
> "It follows, therefore, the Court of Civil Appeals correctly held that the contract was usurious and that all provisions with reference to interest were void."

In the case of *Shropshire* v. *Commerce Farm Credit Co.* (Tex. Sup. Ct.) 39 S. W. (2d) 11, one of the cases quoted by Judge Hutcheson in the *Atwood* v. *Deming Inv. Co.*, 85 Fed. (2d) 180, the Supreme Court of Texas said:

> "The court recognizes its duty in determining the validity of the contract herein involved to apply the universally accepted rule declared in Galveston Co. v. Guymes, 63 S. W. 860, 861, 64 S. W. 778, in the following words: 'To determine the question of usury in a contract, it must be tried by the statutory limitation of 10 per cent, per annum for the use, forbearance, or detention of the money for one year. If the interest contracted for exceeds that rate, it constitutes usury, no matter in what form the contract may be expressed. The court must give to the terms of the contract, if fairly susceptible of it, a construction that will make it legal, but has no right to depart from the terms in which it is expressed to make legal what the parties have made unlawful."

That the contract was usurious and therefore

void, that question was presented and argued in appellants' Main Brief, pages 100 and 101, in Reply Brief, pages 16 to 19, and on pages 22 to 25 of appellants' Motion for Rehearing. (Tr. R. 1065-1068).

In the Summary Statement of the Matters Involved, on pages 18-21 of this Application for Writ of Certiorari, the September 28, 1925 contract is analyzed, showing that that instrument is nothing but a pure loan of money. The half interest conveyed to the Houston Oil Co. by the Pratt-Hewit Corporation, of all its property, was a pure bonus for which the Houston Oil Co. paid no consideration, thereby bringing the rate of interest far in excess of 10%.

Question 8. The decision of the Circuit Court in failing to decide in its written opinion the question presented to it, namely, whether the September 28, 1925 contract violates the Monopoly and Anti-Trust statutes of Texas, and thereby answered the question in the negative, is in complete conflict with said Texas statutes and the decisions of the Supreme and other courts of Texas construing said statutes. Some of the statutes read as follows:

> "A monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods:
>
> "1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the

purpose of producing, or when such management or control tends to create a trust as defined in the first article of this chapter." Texas R. S., Art. 7427; Pen. Code, 1925, Art. 1633.

"Art. 7426. TRUSTS.—A trust is a combination of capital, skill or acts by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either or all of the following purposes:

"1. To create, or which tend to create, or carry out restrictions in trade or commerce or aids to commerce, or in the preparation of any products for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by laws of this state."

"2. To fix, maintain, increase, or reduce the price of merchandise, produce or commodities, or the cost of insurance, or the preparation of any product for market or transportation.

... ...

"6. To regulate, fix or limit the output of any article, or commodity which may be manufactured, mined, produced or sold, on the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation."

"It does not matter that parties to the unlawful combinations may not have been actuated by any bad motive, or that the public may have been temporarily benefited by it; such combina-

tion was incompatible with public policy." San Antonio Gas Co. v. State, 22 Tex. Civ. App. 118, 125, 54 S. W. 289, Error refused, per Fly.

"Our anti-trust statutes have materially enlarged upon the common law. They denounce and make illegal, void and criminally punishable almost every conceivable kind of combination or contract which tends to restrict trade or commerce." 29 Tex. Jur. 749.

"The statute (Anti-Trust) ignores any distinction between restrictions that are reasonable and those which are not, and denounces both kinds." 29 Tex. Jur. 753, citing Henderson Tire & Rubber Co. v. Roberts (Com. App.) 12 S. W. (2d) 154, affirming 1 S. W. (2d) 510.

"Any contract or agreement in violation of the provisions of the anti-trust statutes of this state are absolutely void and unenforceable in the courts of this state. Rev. Civ. Statutes of Texas, 1925, Art. 7437." Henderson Tire & Rubber Co. v. Roberts, 12 S. W. (2d) 154.

"The act denounces combinations in restraint of trade and makes no distinction between restrictions which are reasonable and those which are unreasonable." Anheuser-Busch Brewing Ass'n v. Houch, (Tex. Sup. Ct.) 88 Tex. 184, 30 S. W. 869.

In the case of *New Century Mfg. Co.* v. *Schewer* (Tex. Com. App.) 45 S. W. (2d) 560, reversing 30 S. W. (2d) 388. the Commission of Appeals of the Texas Supreme Court said:

"The putting of alleged purpose into execution, is a public wrong, and courts will not speculate on the extent of resulting injury to the public."

"Monopolies are contrary to the genius of a free government, and shall never be allowed." Texas Constitution, Art. 1, Sec. 26 in part.

The effect of the September 28, 1925 contract was put under one single management and entire control, namely, that of the officers and directors of the Houston Oil Co. the production, marketing, and complete disposition of all the oil and gas produced and to be produced until the 23,000 acres of oil and gas leases and the two producing wells shall be entirely depleted of oil and gas and other minerals, regardless of the number of years that it will require for completely exhausting all the oil and gas and other minerals from underneath said acreage, owned by the Pratt-Hewit Corporation. What amount, if any, is to be produed, to whom should the oil or gas be sold, what the price was to be, etc., all was put under the full control of the directors and officials of the Houston Oil Co. and as to all of which the directors and officials of the Pratt-Hewit Corporation were completely shorn of the right to be consulted. The effect of this contract was to eliminate completely and forever one of the competitors in the production and in the marketing of oil and gas in South Texas. The Houston Pipe Line being the alter ego of the Houston Oil Co. the latter sold the gas to itself. Houston Oil Co. sold the gas to itself.

The contract contains no provision requiring the Houston Oil Company to produce and pay for each year a minimum amount of either oil or gas produced Thus, the contract purported to give to the Houston Oil Co., its officials and directors, sole power of determining just how much gas and oil should be produced annually on the 23,000 acres of land and to market the same.

The sum total of the contract, as it provisions so plainly portend, was that the entire future of the properties of, and the Pratt-Hewit Corporation, itself, was placed under the absolute control of the Houston Oil Co., For this, the Houston Oil Co. paid no consideration. At that time, and to this day, the Houston Oil Co. was and is engaged in the production of both oil and gas in many fields.

The question whether the September 28, 1925 contract violates the Texas monoply and anti-trust statutes was presented to the Circuit Court of Appeals in appellants' Main Brief, pages 144 to 146, Reply Brief, pages 24 and 25 and in the Motion for Rehearing, pages 30 to 33.

Also see in this application for certiorari under Summary Statement of Matters Involved, pages 21-24 where the September 28, 1925 contract is analyzed showing how it violates the Texas Monopoly and Anti-Trust laws.

9. Whether the decision of the Circuit Court

has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by the District Court as to call for an exercise of this Court's power of supervision in the following:

(a) The short statement in the Circuit Court's decision is misleading in that it implies that the pleadings, and the evidence, and the exhibits present one issue of fact which is as conclusive upon the Circuit Court as the findings of a jury on issues of fact when the Court itself at different times stated that the defendants do not deny "that they (defendants) completed the transaction that you charge they completed," (Tr. R. 721) and made similar statements in its findings of fact and conclusions of law. As has already been seen, the issues presented by this case are pure questions of law.

A *fact* is—"an action; a thing done; a circumstance." Bouvier's Law Dict.

What was "done" that is, the acts complained of by the plaintiffs, is indisputably shown by Exhibits 9, 10, 10A, 11, 12, 13 and 37, written by Pratt, the Houston Oil Co. and Rooke and literally carried out by each one of them as agreed by these instruments, and as is further shown by the Houston Oil Co. extending personal loans to Pratt, as the books of the account of the Houston Oil Co. disclose, and as its supervising accountant, Mr. Fairbrother, testified. (Tr. R. 768-780)

While these acts, which have not and of course could not be disputed, showed a Judas betrayal by Pratt of his corporation, the Pratt-Hewit Corp., and its stockholders, abetted therein by the Houston Oil Co., thereby wholly negating the District Court's finding that there was no fraud and the Circuit Court's affirmation of that finding, nevertheless, that fraud of itself is not the determining answer of the issue presented, which is, did Pratt place himself in a position where his personal-self-interest conflicted with the duty he owed to his corporation and its stockholders, and therefore disqualify himself from negotiating the September 28, 1925 contract on behalf of the Pratt-Hewit Corp?

While Pratt's acts carried with them a heinous fraud, nevertheless, it is possible for an officer of a corporation to disqualify himself from acting in its behalf without being guilty of fraud. The following colloquy between the Court and counsel discloses that court's error of the law applicable to this case:

> "THE COURT: (District Court) *They don't deny that they completed the transaction that you charge they completed... Now I want you to get down to the issue in the lawsuit and SHOW ME THE FRAUD.* I realize that you have plead here time and time again that the Houston Oil Company bought the official discretion of Thomas H. Pratt and thereby induced him to execute or cause to be executed this contract to convey half of the Pratt-Hewit properties to the Houston Oil Company. Now then you plead in your amended complaints that B. F. Rooke and his wife executed a lease to A. D. Rooke on 200

acres and that A. D. Rooke entered into a drilling contract with the Houston Oil Company and they were to drill a well or two wells on it and that A. D. Rooke then assigned half of the mineral rights under that 200 acres to Thomas H. Pratt and that Pratt then sold or pretended to sell 7/32 to the Houston Oil Company for $32,500 and 4/32 to E. H. Buckner for $18,000 and that he has 3/32 left. *Now you contend that those things are circumstances to show that his official discretion was bought.*

"MR. BARTELT: Yes.

"THE COURT: *Now they don't deny the execution of those instruments. There is no dispute about it. Now let's get away from them. It is in evidence here that all those things were done.* But they deny that it was done for the purpose for which you say it was done. Now I want you to please go ahead and put in this case, if you have any, evidence to show that that was fraudulent. If you have any evidence other than the making of those payments and the mere circumstance of the execution of those assignments, put it in here.

"MR. BARTELT: First of all, we are putting in circumstances one by one, and this is one circumstance.

"THE COURT: *Now you just keep coming back to the same circumstance that is not disputed;* that there is no dispute at all about.

"MR. BARTELT: In the second place, *the gist of this action is* this: that *an officer of a corporation cannot have interests which* will

conflict with his duties to the corporation. He cannot represent the Pratt-Hewit Oil Corporation and be receiving these sums of money from the Houston Oil Company at the same time. We will also show, as has been stated here, that those instruments were kept off record.

"THE COURT: You argue that that is another circumstance. Now you have established that.

"MR. BARTELT: *And the burden of proof is on a fiduciary. The burden of proof is upon him.* (Tr. R. 721-723.)

Inasmuch as Pratt's private dealings with the Houston Oil Co. commenced at the time the September 28, 1925 contract was made, and continued every day until his death on September 3, 1938, those facts being admitted, the burden is cast upon the defendant, the Houston Oil Co., and other defendants, to prove that these acts were not fraudulent. Not one single authority was ever submitted by the defense, or by the District Court, or in defendants' brief, or in the opinion of the Circuit Court which would show or tend to show that the acts of Pratt and the Houston Oil Co. were legal.

In the very recent case of *Pepper* v. *Litton*, 308 U. S. 295 60 S. Ct. 238, 245 and 247, this Court said:

"A director is a fiduciary. Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 588, 23 L. Ed. 328. *So is a dominant or controlling stockholder or group of stockholders.* Southern Pacific Co. v.

Bogert, 250 U. S. 483, 492, 39 S. Ct. 533, 63 L. Ed. 1099. Their powers are powers in trust. See Jackson v. Ludeling, 21 Wall. 616, 624, 22 L. Ed. 492. Their dealings with the corporation are subjected to *rigorous scrutiny* and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. Geddes v. Anaconda Copper Mining Co. 254 U. S. 590, 599, 41 S. Ct. 209, 212, 65 L. Ed. 425. . . . . "

". . . . . "

"*He* (an officer of a corporation) who is in such a fiduciary position *cannot serve himself first and his cestui second.* He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity *violate the ancient precept against serving two masters.*" . . . . . Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation."

The Court in its findings of fact No. 17 (Tr. R. 516-17) after reciting a part of exhibits 9, 10, 10A, 11, 12, 13, and 37 says this:

"As far as the record shows, these are *mere circumstances to which the plaintiff points with suspicion,* but *I fail to find any evidence of fraud in those transactions.*"

Then again in findings of fact No. 18 (Tr. R. 518) the Court again says:

> "I think I have stated that *the circumstances relied upon* by the plaintiff and the intervenor to show fraud are *mere suspicions* so far as the record in this case shows *and do not support the charges of fraud and* overreaching and *purchase of official discretion* made in this case."

As to all this, including exhibits 9, 10, 10A, 11, 12, 13 and 37, and the loans extended to Pratt as the Houston Oil Co. books show, and all the other undisputed acts of Pratt and the Houston Oil Co., and further as to the District Court labeling all this evidence as "mere suspicion on the part of plaintiff," when this Court has said "the burden of proof lies with the dominant stockholder" the Circuit Court of Appeals says:

> "The findings and the conclusions of the District Court are free from error and the judgment appealed from is affirmed." (Tr. R. 1042.)

Suppose the following two questions were put to a layman:

May an officer of a corporation while negotiating a contract for his corporation with X Company secretly accept personal loans of money from X Company?

May an officer of a corporation while negotiating a contract with X Company for his corporation,

secretly accept a conveyance of ½ interest in an oil and gas lease from a third party, for which the officer paid nothing? Could the officer then turn around and sell a 7/32 to X Company for $32,500, and to the president of X Company a 4/32 for $18,571.40, leaving a valuable 3/32 interest in himself? What if it should develop some 16 years later, as it has in this case, that neither officer nor the X Company nor its president had ever placed these conveyances of record when the universal practice in the oil business is to record them immediately? Would not the prompt answer of the layman be: "No man can serve two masters," giving his reason for his answer in the rest of the quotation, "for either he will hate the one and love the other; or else he will hold to the one and despise the other." Is that not what the Supreme Court of Texas said in effect in the case of *Nabours* v. *McCord (supra)*, and also what Justice Cardoza so well expressed in *Wendt* v. *Fischer, (supra)?*

(b) Inasmuch as four issues were presented by the record and raised in appellants' Main Brief, Reply Brief and Motion for Rehearing, each one being fundamental, raising the question whether the September 28, 1925 contract was void ab initio, with an affirmative answer to one of them being sufficient to reverse the decision of the District Court, was it not palpable error for the Circuit Court not to have answered each one of them and to have discussed each one of them in its decision?

As to the question whether the September 28, 1925 contract is void because it delegates the managing

powers of the Pratt-Hewit Corp. to the directors of the Houston Oil Company, or because it violates the Texas usury statutes, or because it violates the Texas monopoly and anti-trust statutes, the answer to those questions appear in the face of the contract itself which is of record in the case. Consequently, these last three questions, at least, challenge the jurisdiction of the District Court and also the jurisdiction of the Circuit Court to enter a dismissal of plaintiffs' cause of action because there was no fraud or because of any other reason before passing upon those jurisdictional questions. Lack of jurisdiction is a question which every court should consider whenever and however it is raised.

> "Lack of jurisdiction . . . is a question the court should consider whenever and however raised even if the parties forbear to raise it, or consent that the case may be heard upon its merits." In Re Ettinger 76 F. (2d) 741 (C. C. A. 2d).

> "Even the Supreme Court will raise lack of jurisdiction of the subject matter on its own motion when the case reaches that late stage. (Louisville & Nashville Ry. Co. v. Mottly, 1908, 211 U. S. 149, 29 S. Ct. 42, 53 L. Ed. 126.) Such a lack of jurisdiction can never be waived by the parties or such jurisdiction conferred on a court by consent of the parties. Citing in footnote—U. S. v. Griffin (1937) 58 S. Ct. 601; City of Stuart v. Green (C. C. A. 5th, 1937) 91 D. (2d) 603, certiorari denied, 58th Sch. 146; Levering & Garrighes Co. v. Morris (C. C. A. (2d) 1932), 61 F. (2d) 115, aff'd 289 U. S. 102." Moore's Fed. Prac. Vol. 1, p. 662.

"Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist. In fact, it must, of its own motion always consider the question of its jurisdiction over any matter brought before it, although not raised by the parties, since it is bound to take notice of the limits of its jurisdiction." 14 Am. Jur. p. 368.

" . . . . . even though the action was improperly brought and should and will be eventually dismissed, nevertheless, the court will retain jurisdiction long enough to adjudicate issues raised by interventions, when necessary to do justice." Moore's Fed. Prac. Vol. 2, p. 2377.

(c) In that the four questions, *one*, whether Pratt placed himself in a position where self-interest conflicted with duty, *two*, whether the September 28, 1925 contract unlawfully delegated the managing power of the Pratt-Hewit Corp. to the directors of the Houston Oil Co., *three*, whether said contract violated the Texas usury statutes, and *four*, whether said contract violated the Texas monopoly and anti-trust statutes, although presented but not answered or discussed, it is probable that the decision of the Circuit Court would be res judicata as to each and everyone of these questions and thereby would cut off parties' right to relitigate them in a new action.

If such is the result, then the procedure whereby the petitioners have lost such right of action is directly in violation of the settled judicial procedure that meets the requirement of the due process clause

of the Fifth and 14th Amendments to the U. S. Constitution.

Petitioners are not unmindful of the volume of opinions which are being turned out each year in the courts of all jurisdictions which necessitate that judges be given the widest latitude possible in the exercise of their discretion as to when an opinion should or should not be given, and just what such opinion should or should not contain, nevertheless, American Jurisprudence, being largely founded upon precedence, there are limits to the exercise of this discretion, that is, cases may arise where to fail to write opinions and discuss questions presented, might constitute a denial of judicial procedure to litigants.

In the instant case, there is involved a basic question pertaining to the relationship of a fiduciary to his beneficiary.

The decision, if the material facts were set forth, would show that the Circuit Court overruled a principle of law pertaining to fiduciaries and their beneficiaries which has been obtained in all courts. Where courts overrule long established principles of law enforced in all courts, it does not lie within the discretion of any court not to state the controlling facts and the reasons for setting aside such long established principles of law.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed

to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 10199, styled *Wert T. Reed, et al, Appellants,* v. *Houston Oil Company, of Texas, et al, Appellees,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of the said Circuit Court of Appeals for the Fifth Circuit be reversed by this Court and for such further relief as to this Court may seem proper.

Dated this ..... day of March, 1943.

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